

1           A       Yes.

2           Q       And do the colors correspond, the  
3       green in your table is the green on this  
4       chart, and the yellow in your table is the  
5       yellow in this chart?

6           A       Yes.

7           Q       So, Mr. Herman, if you could just  
8       tell us what this exhibit in front of you,  
9       Tennis Channel Exhibit 189, tells you?

10          A       Yes, this is, in terms of form,  
11       the same format, same process, as the last set  
12       of charts.

13                   The total pie represents Versus  
14       top 30 accounts. The dark green part  
15       represents the -- that says the Tennis Channel  
16       is doing business with those accounts that  
17       represented     percent of the revenue from  
18       Versus top 30 accounts.

19                   The yellow means the Tennis  
20       Channel made a presentation to or had  
21       conversations with accounts that represented  
22       percent of Versus revenue.

1                   So in total,       percent of  
2       Versus's top 30 -- in total, the revenue from  
3           percent of Versus' top 30 accounts,  
4       somebody that works for me has been doing  
5       business with or is talking to about doing  
6       business with.

7                   MS. POGORILER: Your Honor, I lost  
8       track, but if I didn't move this one into  
9       evidence, I do now.

10                  JUDGE SIPPEL: That's okay. I let  
11       this go. We -- this has been marked as Tennis  
12       Channel Exhibit 189. Is that correct?

13                  MS. POGORILER: Yes.

14                  JUDGE SIPPEL: And that's the  
15       Versus/Tennis Channel advertiser overlap for  
16       2010. It's marked. You're moving it into  
17       evidence.

18                  Any objection?

19                  MR. MOSS: Subject to  
20       completeness, Your Honor, no objection.

21                  JUDGE SIPPEL: Okay. Received at  
22       this time then as Tennis Channel Exhibit 189.

1           (The document, having been marked  
2           previously for identification as  
3           Tennis Channel Exhibit No. 189,  
4           was received in evidence.)

5           BY MS. POGORILER:

6           Q     And Mr. Herman, in preparing the  
7           data that is a source of this chart, did you  
8           include all Versus advertisers and all Tennis  
9           Channel advertisers, or did you exclude any?

10          A     No, no. It was the same process  
11          as Golf Channel. It was a little more  
12          difficult, but we tried to exclude -- since  
13          Versus is a multi-sport channel, products or  
14          services that were specifically needed for,  
15          you know, if there was hockey stick  
16          advertising, then we would not have included  
17          th money from hockey equipment, as an example.

18          Q     Now, in preparing your written  
19          direct testimony, did you look at any other  
20          information about the ad overlap between  
21          Tennis Channel, Golf Channel, and Versus?

22          A     Yes. I did. I wanted to look at

1       it from another point of view. I mean, we're,  
2       as you know, a relatively new channel, and we  
3       probably have a couple hundred of accounts.  
4       Golf Channel has well over 500 accounts, and  
5       so does Versus.

6               So, I wanted to see what it would  
7       look like if we took Tennis Channel's top 30  
8       accounts and how many of those accounts  
9       purchased advertising on other sports  
10      channels, including Golf Channel and Versus,  
11      and that's the chart, I believe, in tab C.

12             Q       And what did you conclude from you  
13      study of this issue?

14             A       Well, again, it reinforced, which  
15      is probably obvious, that from advertisers'  
16      point of view, Tennis Channel is a sports  
17      channel and competes with other sports  
18      channels.

19               So, this is a list of our top 30  
20      billing accounts, and if you read to the  
21      right, you can see the amount of money that  
22      those same accounts spent on the other sports

1 channels.

2 percent of all of Tennis  
3 Channel's top 30 accounts purchased multiple  
4 other sports channels.

5 percent purchased Golf Channel.

6 Not the revenue, the actual numbers of  
7 accounts, over out of 10 accounts that  
8 placed money on Tennis Channel also placed  
9 money on Golf Channel.

10 And percent of the accounts  
11 that we do business with of these top 30 also  
12 did buys on Versus.

13 Q Now, in your experience, does  
14 Tennis Channel's level of distribution affect  
15 its ability to sell advertising?

16 A From my experience, distribution  
17 is the single most important factor in our  
18 ability to compete and to increase revenues.

19 And on the flip side, it turns out  
20 to be the single most prevalent reason that we  
21 get from advertisers for not doing business  
22 with us.

1           Q       Now, do you have an understanding  
2       as to why that is?

3           A       Yes. I mean, you know, from the  
4       advertiser's point of view, they want their  
5       commercials to be seen by as many people as  
6       possible.

7                       And in the way television works,  
8       the more households a cable channel has -- you  
9       know, I'm simplifying it, but the more  
10      households you have, the more people are going  
11      to see the commercials, and advertisers want  
12      to have more people see the commercials.

13                    The more households you get, the  
14      more impressions you have to sell, it changes  
15      your rate basis. When your rates go up, then  
16      your inventory becomes more valuable, and you  
17      can earn higher shares of ad budgets.

18                    It's the fundamental mathematics  
19      of how cable works.

20                    MS. POGORILER: Your Honor, just  
21      because we're about to get into some specific  
22      names which are confidential information, we

1 would ask that people who haven't signed a  
2 protective order be excused from the room.

3 JUDGE SIPPEL: Okay. You know  
4 who you are.

5 JUDGE SIPPEL: Someone will try to  
6 locate you, when it's appropriate.

7 (Pause.)

8 MS. POGORILER: Thank you, Your  
9 Honor.

10 JUDGE SIPPEL: You have to be nice  
11 to the press, because --

12 (Laughter.)

13 -- they like stuff.

14 MS. POGORILER: That's good  
15 advice.

16 (Laughter.)

17 JUDGE SIPPEL: Go ahead.

18 BY MS. POGORILER:

19 Q Mr. Herman, can you just give us  
20 one or two examples of when Tennis Channel's  
21 distribution has been an issue for it in  
22 selling ads?

1           A       Yeah, sure. I mean, we've been  
2       pitching, trying to get business from       for  
3       years. They're one of the largest, you know,  
4       television advertisers.

5                       And consistently, the response is,  
6       you guys look great, but you don't have enough  
7       distribution, and you don't have national  
8       Nielsen ratings.

9                               is an example  
10      we've been talking to for quite a few years.  
11      They also agree, because all the syndicated  
12      research shows that we're a good fit, and  
13      they've said for years, love you guys, you're  
14      just not big enough. You don't have enough  
15      distribution. We don't think we're going to  
16      get enough reach out of buying you.

17                   MR. MOSS: And Your Honor, we'd  
18      just like to interpose an objection. I  
19      believe Mr. Herman is summarizing paragraphs  
20      16, 17, 18 and 20.

21                   JUDGE SIPPEL: Of his testimony?

22                   MR. MOSS: I'm sorry. Yes, I'm



1       sorry, I think I did that too quickly. 16,  
2       17, 18, and 20, which consist entirely of  
3       hearsay, and I think in some cases, double  
4       hearsay.

5                   And we just argue, Your Honor,  
6       that although we haven't objected to  
7       admission, that this evidence isn't entitled  
8       to any weight at all.

9                   JUDGE SIPPEL:  Because of its  
10       hearsay nature?

11                  MR. MOSS:  Yes, Your Honor.

12                  MS. POGORILER:  Your Honor, we  
13       actually have --

14                  MR. MOSS:  I'm sorry?

15                  MS. POGORILER:  We actually have  
16       some questions we can ask Mr. Herman to  
17       explain -- to address that concern.

18                  JUDGE SIPPEL:  All right.  Because  
19       really, the test is more a test of  
20       reliability.  Hearsay, per se, can be --  
21       doesn't necessarily have to be not believed.  
22       On the other hand, it does raise a concern,

1 and you've raised it, so let's see if we can  
2 address it.

3 BY MS. POGORILER:

4 Q Mr. Herman, have advertisers ever  
5 directly expressed to you that Tennis  
6 Channel's distribution or lack of Nielsen  
7 ratings is the reason that they would decline  
8 to buy ads on Tennis Channel?

9 A Yes. In the case of  
10 , over the years, I've had multiple  
11 salespeople call on that  
12 report back to me with the results of their  
13 meetings.

14 I've attended meetings at  
15 , and spoken with the planning groups  
16 and the buyers. And I ask them, point-blank,  
17 is Tennis Channel's distribution going to  
18 stand in the way of you doing business with  
19 us?

20 And the answer was, at this point,  
21 you guys are too small. For us to buy you  
22 would require some sort of an exception.

1                   Part of that conversation, I  
2       proffered that, are we too small during our  
3       Grand Slam events when we increase our  
4       distribution to, you know,                   homes?

5                   And that was taken under  
6       consideration.

7                   And in the            case, I was not  
8       personally at the meetings, but there were  
9       three separate -- my recollection is that  
10      there were three separate staff members that  
11      called on that account that all came back with  
12      similar comments about size.

13                  You know, like I said, this is the  
14      most common reason we get, is distribution.

15                  MR. MOSS:  And Your Honor, we have  
16      an objection.  I mentioned the double hearsay  
17      concern before.  With respect to        , I think  
18      Mr. Herman just testified that he wasn't  
19      actually even having those conversations with

20                  --

21                  JUDGE SIPPEL:  That's correct.

22                  MR. MOSS:  -- that it was his

1 sales reps --

2 JUDGE SIPPEL: It was reported  
3 back to him.

4 MR. MOSS: Exactly, Your Honor.  
5 And those sales reps have not been called to  
6 testify.

7 JUDGE SIPPEL: I understand that.  
8 I understand that. No, I understand that. Do  
9 you want to address that in any way? I'm not  
10 saying that you have to. We can move on, if  
11 you're ready.

12 MS. POGORILER: Yes.

13 BY MS. POGORILER:

14 Q Mr. Herman, is it part of your  
15 business to understand the ad climate and the  
16 concerns expressed by advertisers?

17 A Yes, it is.

18 Q And do you regularly rely on  
19 reports from your staff about what they're  
20 hearing from advertisers?

21 A I get reports following virtually  
22 every sales meeting that's taken place on what

1       happened at the sales meeting. I get the  
2       reports from my staff. I get the reports from  
3       the management that they report into. So --

4               JUDGE SIPPEL: Verbal or oral  
5       reports?

6               THE WITNESS: Primarily oral  
7       reports.

8               JUDGE SIPPEL: Primarily oral? Do  
9       you take notes of those?

10              THE WITNESS: Usually not, unless  
11       I have to have some -- unless I have an action  
12       that I have to provide, then I'm asking them  
13       what was going on.

14              And --

15              JUDGE SIPPEL: Go ahead. Don't --  
16       go ahead. I'm sorry.

17              THE WITNESS: No, I think this is,  
18       I was going to end with, this process is for  
19       people that have my position, standard  
20       operating procedure. The senior management  
21       can't possibly go on every sales call. That's  
22       why you have staffs to do that.

1 MS. POGORILER: I mean, Your  
2 Honor, we think that's sufficient to establish  
3 the reliability, and I would move on with my  
4 questioning.

5 JUDGE SIPPEL: Well, I don't have  
6 to rule -- well, you know, I guess I really  
7 should say something about the reliability.

8 MR. MOSS: Your Honor, we'd also  
9 just make the point that I think Mr. Herman  
10 testified that there were documents or notes  
11 of these conversations. We haven't received  
12 a scrap of paper related to any of these --  
13 oh, he said he has none. I'm sorry.

14 JUDGE SIPPEL: No, he told me he  
15 doesn't take notes, and he said he doesn't get  
16 them in writing.

17 MR. MOSS: We haven't received  
18 anything. We haven't received anything  
19 related to any of these --

20 JUDGE SIPPEL: So this is just --  
21 it's all up here.

22 MR. SCHMIDT: Your Honor, just so

1 we say it, we've already had a lot of hearsay  
2 come in. Given some of the evidence they have  
3 said they're going to proffer, I'm frankly  
4 surprised at the objection, because I think  
5 part of the process here, particularly for  
6 someone in Mr. Herman's position, is that the  
7 idea that we're going to call every rep and  
8 then subpoena the third parties to say, that's  
9 in fact what you said, I don't think that's  
10 consistent with the processes that have been  
11 set up here for an expedited process.

12 But to the extent that this is an  
13 issue, we think it should be -- we can take it  
14 up outside of the time of this witness,  
15 because what we put in, we have to put in now,  
16 and this witness -- I propose that we take  
17 this hearsay issue up later.

18 JUDGE SIPPEL: Well, he's  
19 testifying -- I mean, that's in the record,  
20 what he says about that goes in the record.  
21 The question is what gets done with it.

22 And you're right, I don't have to

1 make an ultimate ruling at this time, but I  
2 don't want to let things slip. It is what I'm  
3 hearing.

4 I'm hearing that he's testifying  
5 as to what is -- what is -- basically what is  
6 standard practice in the industry.

7 This is how you do things. You've  
8 got people in your office, and you send them  
9 out to talk to prospective advertisers. I'm  
10 sure that goes on to a fair-thee-well, and  
11 somehow or other, you've got to get the  
12 information back and do something with it.

13 Well, you don't get it back in  
14 writing. You get it back by oral reports.  
15 And then, you know, what do you do with it?  
16 Well, if they're coming in and saying that  
17 they'd like to see -- these companies would  
18 like to see more coverage, I mean, that really  
19 doesn't take it very, very far.

20 I would assume that everybody --  
21 any -- and this is all assumptions on my part,  
22 but this is how I'm seeing it. If you go to



1 a -- you're trying to buy somebody's -- you've  
2 got to get somebody to buy time so they can  
3 advertise. Isn't that how it works?

4 THE WITNESS: Yes.

5 JUDGE SIPPEL: There's going to be  
6 a bit of a -- I don't want to say a conflict,  
7 but there's two different interests there.

8 You want to sell the time, and the  
9 guy that you're selling it to or the person  
10 that you're selling it to, excuse me, may want  
11 to bid -- they're going to want to be sure  
12 that they're getting the best bang for their  
13 buck.

14 So there's always going to be that  
15 tension. Tension's the word, I think, of that  
16 -- that the buyer of the time is always going  
17 to be concerned about whether or not -- he's  
18 being -- you're giving him the scoop on how --  
19 obviously, how many -- what do they call them,  
20 eyes, they're reaching ears or eyes, whatever  
21 they are.

22 THE WITNESS: Eyes.

1 JUDGE SIPPEL: People. And  
2 consumers possible. So there's always going  
3 to be that tension.

4 So there's always going to be -- I  
5 mean, the information certainly is reliable in  
6 the sense of it's explaining how you conduct  
7 your business. And I haven't heard anything  
8 from anybody -- even an objection or anything  
9 that what you do is outside the norm of how  
10 business is conducted.

11 So we'll just take it at that  
12 basis. Obviously, the fact that it's not  
13 reduced to writing, that this -- is, you know,  
14 there's double hearsay that goes on a lot in  
15 this world.

16 Look, I'm accepting really both  
17 sides on it. I think this is a legitimate way  
18 of presenting the evidence, but I think it's  
19 a question of how much weight to give to it,  
20 and that's always an arguable point.

21 Personally, I see nothing right  
22 now, listening to this witness, that indicates

1 to me that he's trying to puff something up.

2 But how would I know, right? That's the  
3 problem, is how I would know?

4 So anyway, I'm going to rule on  
5 this as though there's an objection to this as  
6 hearsay, and I'm going to overrule the  
7 objection.

8 The evidence is coming in as the  
9 witness has testified to. He's the witness.  
10 He's testified.

11 He's being cross examined, or he  
12 will be cross examined, and let's see how the  
13 record looks after the end of the day.  
14 Something like that. Okay? Here we go.

15 Now, what is your witness order,  
16 by the way? This witness is going to be on  
17 for how long, you think?

18 MS. POGORILER: I only have a few  
19 more minutes, Your Honor, and then it's --

20 JUDGE SIPPEL: Cross examine.  
21 Okay. Well, was it the intention of the  
22 parties to do more than this witness today?

1 MR. SCHMIDT: Oh, yes, Your Honor.

2 JUDGE SIPPEL: Thanks. Okay.

3 That's --

4 MR. CARROLL: Your Honor, we're  
5 going to have a busy day.

6 JUDGE SIPPEL: Like as compared to  
7 what, yesterday?

8 (Laughter.)

9 All right.

10 You may proceed. I'm sorry, you  
11 may proceed.

12 BY MS. POGORILER:

13 Q Mr. Herman, I think you had an  
14 example in your testimony involving

15 . Could you tell us about that?

16 A Yes. We had been trying to get --

17

18 and we'd been trying to get

19 on the buy for a long

20 time.

21 They had hired

22

11 Q Now, did there come a time when  
12 did make an ad buy on Tennis  
13 Channel?

22 But here's the point, that they

1       bought us during our freeview opportunity,  
2       when Tennis Channel's distribution went from  
3       its normal                   households and then  
4       expanded up.

5               So during the French Open, we were  
6       in               households, and during  
7       Wimbledon, we were in               households.

8               So, I don't know, you know, with  
9       certainty that the only reason that  
10      bought us was because we were in more  
11      households.

12              I'm sure some of it had to do with  
13      the fact that, you know, it's tennis, and they  
14      wanted to be in the French Open and Wimbledon.

15              But it's hard for me to imagine  
16      that for all the years that we didn't get any  
17      business from them that the only time we would  
18      is when our distribution increased, and as  
19      soon as the distribution went back to its  
20      normal level, we don't get any buys from them.

21              Q       Mr. Herman, maybe you could just  
22      explain what a freeview is?

1                   And Mr. Herman, from now on, if we  
2                   can leave the names of specific advertisers  
3                   out.

4                   A        Sure.

5                   JUDGE SIPPEL:   Okay, is that okay?

6                   Okay, let's get the press back in  
7                   the room.   So, okay, just keep going.

8                   BY MS. POGORILER:

9                   Q        I think we were -- just to clarify  
10                  what a freeview is.

11                  A        Yes.   A freeview is when Tennis  
12                  Channel goes to our cable, terrestrial and/or  
13                  Telco partners and say to them, "You guys can  
14                  offer this tournament to your customers for no  
15                  charge.   So they don't have to pay us a  
16                  license fee to show the French Open to all  
17                  their customers.   So that's what a freeview  
18                  is.   And that's how Tennis Channel's  
19                  distribution for specific times of the year  
20                  can increase so dramatically.

21                  Q        And do you generally notice any  
22                  difference in ad sales during the freeview

1 periods?

2 A Yeah. I mean when I look at the  
3 ad sales from -- We do four freeview periods  
4 a year which is eight weeks a year. And the  
5 total percentage of all the nation sales in  
6 those eight weeks represent -- those eight  
7 weeks represent 65, you know, 60 percent of  
8 our total national sales during the eight  
9 weeks of the year that we have expanded  
10 distribution. So it's important.

11 Q And do you know what the reason is  
12 for the improved ad sales during freeviews?

13 A I think more advertisers are  
14 comfortable that their commercials are going  
15 to be seen by enough people because there is  
16 sort of rule of thumb that they want you to be  
17 in over 40 million homes. And in both of the  
18 French Open -- In all those four cases we are  
19 in over 40 million homes.

20 We generate more impressions.  
21 More people are watching. We get higher rates  
22 and we get more revenue.



1           Q       Do you rule out that the events  
2       that are featured during the freeviews play  
3       some role in the improved ad sales?

4           A       No. I don't rule it out. But I  
5       think the impetus behind the revenue increase  
6       is the distribution. And one way we know by  
7       the way is that during the U.S. Open when  
8       we're in 50 million homes we get higher unit  
9       rates and more revenue than when we're in the  
10      Australian Open when we're in 40 million  
11      homes.

12          Q       Mr. Herman, do you use ratings  
13      when you're pitching advertisers?

14          A       Yeah. We use Nielsen local market  
15      ratings. We don't have national ratings.

16          Q       And do you present the ratings to  
17      advertisers on a local market basis?

18          A       We get the information on a local  
19      market basis. And to simplify the process we  
20      aggregate the local markets and we submit one  
21      number.

22          Q       And do advertisers accept that

1 methodology?

2 A Some do. Some don't. The primary  
3 advertisers that are national advertisers that  
4 we have on the air do accept it. But there's  
5 a large, large group of national advertisers  
6 that still insist on national rates.

7 Q And in your experience does Tennis  
8 Channel's advertising revenue its ability to  
9 grow as a network?

10 A Yeah. I mean I think I mentioned  
11 before we're ad supported. We make money  
12 through affiliate sales and through ad sales.  
13 That's it. So our ability to expand our  
14 facilities to buy more programming rights, to  
15 do more original programming, isn't solely  
16 determined by ad sales. But we have a  
17 significant part in the revenue of the  
18 company.

19 MS. POGORILER: Mr. Herman, I have  
20 no further questions right now.

21 JUDGE SIPPEL: This has got  
22 nothing to do with the witness. But I'm going